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ADDRESS

**ANNUAL MEETING OF THE NATIONAL
DIOCESAN ATTORNEYS ASSOCIATION**

**AS THE PENDULUM SWINGS FROM
CHARITABLE IMMUNITY TO
BANKRUPTCY, BRINGING IT TO REST
WITH CHARITABLE VIABILITY***

MOST REVEREND THOMAS J. PAPROCKI†

In his 1842 short story, *The Pit and the Pendulum*, Edgar Allen Poe tells the tale of the torments endured by a man who is convicted of an unspecified crime and put into a completely dark prison, where he passes out. Upon awaking, he discovers a large, deep pit in the middle of the room. He loses consciousness again and wakes up strapped on his back, able to move only his head. He soon realizes there is a large pendulum with a sharp blade swinging back and forth above him, slowly moving down and getting closer to cutting through his chest and killing him. Somehow he finds a way to break free of his ropes and the pendulum recedes to the ceiling, but the walls of his prison start to move and close in on him, pushing him closer and closer to falling into the pit. On the brink of falling into the pit, the prisoner hears human voices. The walls pull back and his rescuers save him.

Many charitable and religious institutions today feel faced with a similar dilemma as they watch the pendulum swing from

* Keynote Address at the Annual Meeting of the National Diocesan Attorneys Association, April 27, 2008. Substantial portions of this Address have previously appeared in 38 ORIGINS 54 (2008).

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the former protection of charitable immunity to the full exposure of charitable liability and even to charitable bankruptcy. They wonder if there is any way to avoid the destruction of being sliced by the swing of the pendulum or the doom of falling into the pit of oblivion.

Even if not completely threatened with extinction, churches in particular feel the burdens being placed on religious exercise in a litigious culture. They wonder if the burdens can be lifted, if the swing of the pendulum can be stopped and brought to rest, and if any champions will come to save them from falling into the pit.

Before we can discuss lifting any burdens, we must first identify what those burdens are. We should also establish as an empirical fact that we are indeed living in a litigious culture; however, given the limited time available for this Address, I would hope that we could take judicial notice of this reality!¹ The context of my observations in this regard is set in relation to my experiences as a Roman Catholic Priest for almost thirty years, a member of the Illinois bar for twenty-six years, a canon lawyer for the past seventeen years, an adjunct professor of law for the past nine years, and as a Bishop of the Catholic Church for the past five years. As a priest, a civil lawyer, and a canon lawyer, I served as Chancellor of the Archdiocese of Chicago for eight years, and for ten years I was the Cardinal's Delegate to the Archdiocese's Professional Fitness Review Board, which handled allegations of clerical sexual misconduct with minors.

I wish to note that the views expressed in this Address are entirely my own and are not intended in any way to represent the views of the Archbishop of Chicago, the Archdiocese of Chicago, the United States Conference of Catholic Bishops, or its members. Moreover, my views are meant not as the final word on this topic, but rather, as a catalyst to prompt further discussion. Since the matters that I intend to raise involve issues of public policy, I would hope that a wide-ranging dialogue could address these topics intelligently and reasonably in a civil fashion, unmarked by the acrimony that too often characterizes the public debate of significant issues in our society.

¹ For a detailed analysis of how litigation concerning clerical sexual misconduct of minors has impacted the Catholic Church, see PHILIP JENKINS, *PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS* 125–38 (1996).

To provide context for our discussion, I note a few items:

First item: As of July 30, 2007, Catholic Charities of the Archdiocese of Chicago had to end its foster care program, which, for almost ninety years, had been one of the largest agencies in Illinois placing abused and neglected children with foster families. Because of a \$12 million settlement of a lawsuit alleging negligent supervision by a few abusive foster parents, our Catholic social service agency in Chicago can no longer get insurance for its foster care program.²

Second item: Last year, the Wisconsin Supreme Court ruled that a man severely injured in a 2002 auto accident will be able to collect more than \$23 million from the Archdiocese of Milwaukee and its insurer.³ What is most troubling about this judgment is that the driver of the car was not an employee of the Archdiocese or the church in any way, but was a volunteer with a Catholic organization called the Legion of Mary, which was not directly affiliated with the Archdiocese or the parish. An activity of the Legion of Mary is the delivery of statues of the Virgin Mary that have been blessed by a parish priest to parishioners who request them. At the time of the accident, the driver was in the process of delivering a statue to a family that had requested one. She was driving her own car.⁴ The driver's only ostensible connection to the Archdiocese was that the Legion of Mary was Catholic in nature and a parish priest blessed the statue. This case raises serious and pressing questions not only about the proportionality of the judgment but also about agency and the supervision of a volunteer who is not in any way under the effective direction or control of the Archdiocese.

Third item: A 2004 research study commissioned by the United States Conference of Catholic Bishops and conducted by the John Jay College of Criminal Justice, entitled *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States*, reported that the

² Ofelia Casillas & Manya A. Brachear, *Catholic Charities Dropping Foster Care: Insurance Coverage Lost After Settlement*, CHI. TRIB., Apr. 17, 2007, at C1.

³ *Heikkinen v. United Servs. Auto. Ass'n*, 739 N.W.2d 489, 489 (Wis. 2007), *aff'g* *Heikkinen v. United Servs. Auto. Ass'n*, 724 N.W.2d 243, 258–59 (Wis. Ct. App. 2006).

⁴ Marie Rohde, *Church Crash Verdict Upheld: Archdiocese's Insurer To Pay More than \$23 Million*, MILWAUKEE J. SENTINEL, Oct. 13, 2007, at A1. The jury award was for \$16.8 million, but that figure rose to \$23 million with interest. *Id.*

amount of money paid by the Church, as a result of allegations, to victims, for the treatment of priests and victims, and for legal expenses was \$472 million.⁵ Other sources have estimated the total costs to be more than twice that.⁶ The claims continue.

The Archdiocese of Boston paid \$85 million in 2003 to settle 552 claims.⁷ The Diocese of Covington, Kentucky, agreed in 2005 to pay up to \$120 million to settle a class action suit filed on behalf of all persons, known and unknown, who were sexually abused by priests or employees of the diocese over the past fifty years.⁸

Some of the largest payouts have come in California due to the temporary lifting of the statute of limitations for a one-year period in 2002. "In California, the Diocese of Orange paid \$100 million for 90 abuse claims in 2004 and the Diocese of Oakland paid \$56 million to 56 people in 2005."⁹ In 2006, the Archdiocese of Los Angeles settled 45 cases of clergy sexual abuse for \$60 million.¹⁰ Last year, in July, Cardinal Roger Mahony, Archbishop of Los Angeles, announced a record \$660 million settlement with another 508 victims of sexual abuse.¹¹ In September of 2007, the Roman Catholic Dioceses of San Diego and San Bernardino agreed to a settlement that would pay nearly \$200 million to 144 people.¹² The amounts are staggering; the ramifications of these payouts will continue to unfold for some time. As a result of various lawsuits and claims of creditors, five Catholic dioceses—in Tucson, Arizona; Portland, Oregon; Spokane, Washington; Davenport, Iowa; and San Diego,

⁵ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* 8 (2004), available at <http://www.usccb.org/nrb/johnjaystudy>.

⁶ See Adam Liptak, *Scandals in the Church: The Liability: U.S. Laws Pose Risk of Steep Penalties*, N.Y. TIMES, Apr. 23, 2002, at A20.

⁷ *On File*, 33 ORIGINS 242, 242 (2003).

⁸ *Covington Diocese Settles Class Action Abuse Suit*, 35 ORIGINS 81, 81–82 (2005).

⁹ Laurie Goodstein, *Deal Reported in Abuse Cases in Los Angeles*, N.Y. TIMES, July 15, 2007, at A1.

¹⁰ *On File*, 36 ORIGINS 436, 436 (2006).

¹¹ Laurie Goodstein, *After Abuse Settlement, An Apology to Victims*, N.Y. TIMES, July 16, 2007, at A9.

¹² Randal C. Archibold, *San Diego Diocese Settles Lawsuit for \$200 Million*, N.Y. TIMES, Sept. 8, 2007, at A8.

California—in recent years have filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code.¹³

It is without question that the sexual abuse of minors is a sin that must be addressed by the Church and a crime that must be punished by both the Church and the criminal justice system. It is particularly despicable and horrendous when such abuse is perpetrated by a person of trust, such as a priest. As the late Pope John Paul II said to American Cardinals and Bishops in 2002, “The abuse which has caused this crisis is by every standard wrong and rightly considered a crime by society; it is also an appalling sin in the eyes of God. . . . People need to know that there is no place in the priesthood and religious life for those who would harm the young.”¹⁴

Regrettably, the individual priests who committed acts of abuse were not the only ones at fault for the crisis. Indeed, in his address to the bishops of the United States during his recent pastoral visit to our country, Pope Benedict XVI acknowledged that in many instances cases of abuse have been “sometimes very badly handled” by those in authority.¹⁵ In saying this, Pope Benedict in fact was quoting from the welcoming remarks to the Holy Father made by the President of the United States Conference of Catholic Bishops, His Eminence Francis Cardinal George, Archbishop of Chicago, who said, “In our own day the consequences of the dreadful sin of sexual abuse of minors by some priests and of its being sometimes very badly handled by bishops make both the personal faith of some Catholics and the public life of the church herself more problematic.”¹⁶

In his homily the next day at the Mass in Nationals Park in Washington, D.C., the Holy Father added:

It is in the context of this hope born of God’s love and fidelity that I acknowledge the pain which the church in America has experienced as a result of the sexual abuse of minors. No words of mine could describe the pain and harm inflicted by such abuse. It is important that those who have suffered be given

¹³ Sandi Dolbee & Greg Moran, *Priest Abuse Case Lawyers Ordered To Appear in L.A.: Judge Likely Aims to Prevent Bankruptcy*, SAN DIEGO UNION-TRIB., Feb. 22, 2007, at B1.

¹⁴ Pope John Paul II, *Address to Vatican Meeting with U.S. Cardinals and Bishops’ Conference Officials*, 31 ORIGINS 757, 757, 759 (2002).

¹⁵ Pope Benedict XVI, *Address to U.S. Bishops*, 37 ORIGINS 729, 730 (2008).

¹⁶ Francis Cardinal George, *Welcome to Pope Benedict XVI*, 37 ORIGINS 736, 737 (2008).

loving pastoral attention. Nor can I adequately describe the damage that has occurred within the community of the church.

Great efforts have already been made to deal honestly and fairly with this tragic situation and to ensure that children—whom our Lord loves so deeply (cf. Mk 10:14) and who are our greatest treasure—can grow up in a safe environment. These efforts to protect children must continue. Yesterday I spoke with your bishops about this. Today I encourage each of you to do what you can to foster healing and reconciliation, and to assist those who have been hurt. Also, I ask you to love your priests and to affirm them in the excellent work that they do.¹⁷

As a strictly secular matter, victims of such abuse have been injured and need to be compensated by those responsible for the harm. At the same time, I would suggest that the current approach of awarding unchecked monetary damages to victims not only is contrary to the purposes of tort liability theory, but also places an excessive burden on the free exercise of religion for Catholics in the United States. If the purposes of such damages in civil cases are not only to compensate for harm, but also to punish wrongdoers and deter wrongful conduct, the settlement or award of civil damages is punishing the wrong people, namely, the average parishioner or donors whose financial contributions support the Church, but who have no role in the supervision of clergy. Most of the bishops who might have been negligent in their supervision of clergy who offended twenty, thirty, or even fifty years ago are long gone. Monetary damages taken from a not-for-profit entity do not punish the wrongdoers, but rather, serve only to constrain the scope of the entity's charitable, religious, and/or educational activities. Further, unchecked judgments threaten to diminish a charitable organization's capability to fairly compensate victims who come forward at a later point in time. While in some cases the claims are being paid by insurance and the sale of undeveloped real estate, in other places, donors' contributions are being diverted from religious and charitable works to pay claimants and their lawyers.

There are various reasons for lawsuits against dioceses. For plaintiffs and their attorneys, the obvious reason is to go after supposed "deep pockets," since lawsuits against the clergy who

¹⁷ Pope Benedict XVI, *Homily at Nationals Ballpark*, 37 ORIGINS 739, 740 (2008).

perpetrated the abuse are not likely to produce very substantial awards or settlements. Yet, these diocesan “deep pockets” are not as deep as some people assume or imagine. The consolidated balance sheet for a diocese usually lists buildings such as churches, chapels, and shrines in their assets, whose book value could be millions or even billions of dollars. However, properties such as houses of worship are not readily sold on the market and do not easily convert into liquid assets. The bankruptcies mentioned earlier also show how precarious the margin of operation actually is for some dioceses.

Another motivation for such lawsuits is, frankly, anger at bishops. The anger on the part of victims is understandable. But there is also anger coming from the people in the pews over the bishops’ mishandling of these cases. Some of them see lawsuits against dioceses as a way to punish bishops.¹⁸ But if one understands the nature of a diocese, it would be apparent that a lawsuit against a diocese does not really punish its bishop. It punishes the Church’s charitable and social outreach.

The Code of Canon Law defines a diocese as “a portion of the people of God which is entrusted to a bishop for him to shepherd with the cooperation of the presbyterate,” that is, the priests.¹⁹ So a lawsuit against a diocese is really a suit against the “people of God” and ultimately, of course, it is they who actually pay its bills, not the bishop.

One might ask why a not-for-profit charitable institution should be treated any differently than a for-profit entity when it comes to corporate liability. This question can be answered on different levels. On one level, unlike the for-profit world where, if a for-profit company is rendered insolvent by its liabilities such that it ceases to function, another will come along to take its place (since nature abhors a vacuum and the dynamic of supply and demand works to fill the void), the kinds of needs satisfied in the case of charitable organizations are not subject to the same

¹⁸ See, e.g., TomRoeser.com: “On the Other Hand,” <http://tomroeser.com/sectionlist.asp?s=&month=11&year=2007> (Nov. 15, 2007, 04:52 EST and Nov. 20, 2007, 06:23 EST).

¹⁹ CODEX IURIS CANONICI (Canon Law Society of America trans., 1998) (1983) c. 369 [hereinafter CIC-1983].

dynamics. As the late Pope John Paul II recognized in his social encyclical, *Centesimus Annus*,

the *free market* is the most efficient instrument for utilizing resources and effectively responding to needs. But this is true only for those needs which are "solvent" . . . and for those resources which are "marketable" But there are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish.²⁰

Likewise, certain fundamental human needs might go unsatisfied if liability against charitable institutions (including the Church) is left unchecked.

At a deeper level, there is the very nature of the Church, which is not simply another charitable institution, but whose self-understanding is the Body of Christ. Thus, decisions about leadership, authority, and discipline are not simple questions of management and punishment, but must be understood in keeping with the rights conferred by divine institution and described in canon law, as well as in light of religious terms, such as apostolic governance and apostolic succession from the time of the foundation of the Church by Jesus Christ. This is where the attempt to apply neutral principles of purely secular law to the Church breaks down. As Father John Coughlin, Professor of Law at Notre Dame University, has pointed out,

The state has every right to encourage shareholders in a for-profit corporation to change corporate leadership by holding the corporation liable for negligence on the part of the corporate executives and thus cutting into the enterprise's profits. The application of the same liability rules loses its claim to neutrality when state law punishes a church for making what is essentially a religious decision and compels the church to divert funds from its charitable and educational purposes to compensate victims.²¹

Put another way, the Church has a constitutional right to engage in charitable activities (or more correctly, the corporal works of mercy), because they are constitutive of her very

²⁰ JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 34 (1991).

²¹ John J. Coughlin, *Canon Law and Constitutional Law: The First Amendment, Anthropology, Separation, and Neutrality* 50–51 (Notre Dame Law Sch., Legal Studies Research Paper No. 07-24, 2007), <http://ssrn.com/abstract=975838>.

mission.²² As the Synod of Catholic Bishops said in 1971: “Action on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of the preaching of the Gospel, or, in other words, of the Church’s mission for the redemption of the human race and its liberation from every oppressive situation.”²³

The same simply cannot be said of a for-profit corporation, the primary purpose of which is necessarily to provide monetary return on shareholder investment. Strictly speaking, there is no constitutional right to engage in a particular field of commerce, no matter how socially beneficial it may prove to be. The right to freely engage in religious practice, by contrast, is one of our most cherished rights, a right that the Framers placed above the political fray of everyday politics. Here, “religious practice” must mean more than the right to conduct worship services as one pleases. It must go beyond this purely privatized understanding of religion that some would wrongfully impose on our constitutional order.

Federal Judge Patrick J. Schiltz of the United States District Court for the District of Minnesota, formerly Associate Dean and St. Thomas More Chair in Law at the University of St. Thomas School of Law in Minneapolis, presented a paper at a symposium held on April 4, 2003 at the Boston College Law School entitled, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*. Judge Schiltz identified and discussed the costs “to those who belong to churches and to those who are served by churches” when litigation is used “to bring about compensation for victims of clergy sexual misconduct.”²⁴ These costs include loss of monetary resources a church would otherwise use for religious, charitable, or educational purposes; the possibility of a ministry not representative of the people it serves; decreased positive interactions between pastors and their congregants; a changed relationship between bishop and pastor in which the bishop is no longer a confidant; changes in the structure of the church’s hierarchy; and finally, a decreased ability for churches

²² Synod of Bishops, *Justice in the World (Convenientes ex Universo)* (Nov. 30, 1971), in 2 THE VATICAN COLLECTION, VATICAN COUNCIL II 695, 696 (Austin Flannery ed., 1982).

²³ *Id.*

²⁴ Patrick J. Schiltz, *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty*, 44 B.C. L. REV. 949, 949 (2003).

to participate in public life.²⁵ He “contends that using litigation to compensate victims of clergy sexual misconduct poses a threat to religious freedom.”²⁶ Specifically, he describes the impact of litigation in connection with clergy sexual misconduct on religious liberty in terms of its monetary impact, the impact on the character of the ordained ministry, the impact on the bishop’s and pastor’s relationships with congregants, the impact on the relationship between bishop and pastor, the impact on the relationship between the broader Church and congregations, and the impact on the character of organized religion.²⁷ He concludes by “recommending that churches devise a means of fairly compensating victims with as little harm to religious liberty as possible.”²⁸

Years ago, the charitable and religious purposes of not-for-profit organizations were protected by the common law notion of “charitable immunity.” This concept recognized that charitable institutions receive donations to be held in trust and to be used for charitable purposes. The doctrine of charitable immunity essentially provides that an individual or an organization “engaged in a charitable, educational, religious or benevolent enterprise or activity is . . . for that reason immune from tort liability.”²⁹

As an overview, the doctrine of charitable immunity originated in England in the mid-nineteenth century and was first adopted in the United States in 1876. Thereafter, charitable immunity was adopted in most states. The immunity has assumed various forms, based in large part on the theory employed by the particular state to justify the immunity. Thus, the doctrine of charitable immunity has served as an umbrella under which states have employed various methods of limiting the tort liability of charitable organizations. By the middle to late twentieth century, the immunity had been modified or

²⁵ See generally *id.* at 962–76.

²⁶ *Id.* at 949.

²⁷ See generally *id.* at 962–76.

²⁸ *Id.* at 949.

²⁹ See RESTATEMENT (SECOND) OF TORTS § 895E & cmts. b–c (1979). Although the Restatement does not recognize charitable immunity, section 895E provides a good description of the types of endeavors covered by the immunity in its various incarnations. See *id.*; see also BLACK’S LAW DICTIONARY 766 (8th ed. 2004) (defining “charitable immunity” as “[t]he immunity of a charitable organization from tort liability”).

limited in many jurisdictions, resulting in widespread abrogation during the latter half of the twentieth century. It appears that only fourteen states have retained any significant form of the immunity.³⁰

The doctrine of charitable immunity is generally recognized to have its origin in England in 1846, in *Heriot's Hospital Feoffees v. Ross*.³¹ In that case, a wealthy individual bequeathed his estate to a trust to fund a hospital for orphans.³² The defendant trustees of the hospital denied the plaintiff orphan admission to the hospital even though he met the trust's criteria for admittance.³³ The plaintiff sued the trustees, seeking admittance to the hospital and damages on grounds that the trustees had breached the trust.³⁴ Ruling for the trustees, the court held that the plaintiff could not recover from the hospital's charitable trust funds, because allowing a charity's funds to be used to pay tort claims diverted such funds from the purpose for which they were intended by the donor.³⁵

Charitable immunity was adopted thirty years later in America in *McDonald v. Massachusetts General Hospital*.³⁶ In that case, a student doctor working for the defendant charitable hospital improperly set the fractured bone of the plaintiff patient.³⁷ The plaintiff sued the hospital, claiming that the hospital was vicariously liable for the student doctor's negligence.³⁸ Ruling in favor of the hospital, the court held that because the hospital was a public charity—and because the trustees did not fail to exercise due care in selecting the student doctor or in the administration of the hospital—the plaintiff could not recover from the hospital in tort for the negligent acts of its servant.³⁹

³⁰ Douglas C. Murray, *Charitable Immunity in Illinois: A Suggested Moderate Legislative Approach to Limiting Tort Liability of Religious Organizations* 2 (2005) (unpublished manuscript, on file with Loyola University Chicago School of Law).

³¹ 8 Eng. Rep. 1508 (H.L. 1846), *overruled by* *Mersey Docks & Harbour Bd. Trs. v. Gibbs*, 1 H.L. 93 (1866); *see also* RESTATEMENT (SECOND) OF TORTS § 895E cmt. b.

³² *Heriot's Hosp. Feoffees*, 8 Eng. Rep. at 1508.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1510, 1512–13.

³⁶ 120 Mass. 432, 432 (1876).

³⁷ *Id.* at 434.

³⁸ *Id.*

³⁹ *Id.* at 436.

Thereafter, the immunity was recognized in most American jurisdictions, and at one time, it prevailed in virtually every state in which it had been considered.⁴⁰ However, there does not appear to have been one settled form of the immunity.⁴¹

The safeguards of charitable immunity began to erode in the middle of the twentieth century with the increasing sophistication of medical technology and the rise of medical malpractice claims against hospitals, most of which were not-for-profit institutions. Courts began to determine that it would be contrary to justice and equity to use charitable immunity to deny just compensation to victims of medical malpractice (although since that time, some states have enacted controls and limits to those awards to preserve the viability of providers of medical services).

In 1965, charitable immunity was generally abolished in Illinois in the case of *Darling v. Charleston Community Memorial Hospital*.⁴² In that case, the plaintiff patient's broken leg became infected while he was treated at the defendant charitable hospital.⁴³ The plaintiff brought a direct suit in negligence against the hospital claiming that the hospital failed to (1) maintain a sufficient number of nurses, (2) hold proper consultation with the nurses to determine symptoms, and (3) review the physician's work.⁴⁴ The trial court awarded a judgment in favor of the plaintiff.⁴⁵ On appeal, the hospital contended that the judgment had to be reduced to the extent of the hospital's liability insurance, because insurance was the hospital's only non-trust fund asset.⁴⁶ Ruling for the plaintiff, the court abolished charitable immunity.⁴⁷ In so holding, the court reasoned that the trust fund theory of charitable immunity was logically deficient, and abandonment of the immunity would not cause bankruptcy. The court further noted that (1) it would not

⁴⁰ See RESTATEMENT (SECOND) OF TORTS § 895E cmt. b (1979); see also Parks v. Nw. Univ., 75 N.E. 991, 993 (Ill. 1905).

⁴¹ See President & Dirs. of Georgetown Coll. v. Hughes, 130 F.2d 810, 817 (D.C. Cir. 1942) (noting that the rule has been debated upon and modified in different jurisdictions, making it difficult to accurately determine what the "prevailing rule" would be).

⁴² 211 N.E.2d 253, 260 (Ill. 1965).

⁴³ *Id.* at 255-56.

⁴⁴ *Id.* at 256.

⁴⁵ *Id.* at 259.

⁴⁶ *Id.*

⁴⁷ *Id.* at 260.

permit charitable organizations to limit their tort liabilities based on the amount of insurance they elected to carry, and (2) “[w]hether or not particular assets of a charitable corporation are subject to exemption from execution in order to satisfy a judgment does not determine liability[;] [n]o such issue arises until liability [is] determined.”⁴⁸

Five years later, in 1970, the abolishment of charitable immunity in Illinois was applied to a religious organization in *Gubbe v. Catholic Diocese of Rockford*.⁴⁹ In that case, the plaintiff student was injured in a schoolyard fight at a school that was owned and operated by the defendant diocese.⁵⁰ The student brought a direct suit against the diocese on the grounds that the diocese negligently maintained and controlled its premises and, also, that the diocese provided inadequate and improper supervision of the schoolyard.⁵¹ Though the court ultimately ruled in favor of the diocese on the issue of liability, it held that the abolishment of charitable immunity in *Darling* was proper; thus, charitable immunity was not available to the diocese.⁵²

Now, nearly forty years later, during which time we have experienced an explosion in litigation, particularly mass tort litigation, previously unseen, and I would argue unfathomable, at the time of *Darling* and *Gubbe*, the complete elimination of charitable immunity threatens to inhibit or even eliminate certain services provided by charitable institutions such as Catholic Charities and other diocesan agencies, as indicated in the example of foster care services mentioned at the outset. In claims and lawsuits involving dioceses, plaintiffs’ attempts to include parish properties and parish funds in the total assets of the diocese have left not only bishops and diocesan officials wondering about the status of parish assets, but parishioners themselves have begun to question the security of their donations being used for their intended charitable and religious purposes. The Code of Canon Law recognizes and protects against this by declaring that parish assets are distinct from diocesan assets and that diocesan bishops are generally prohibited from using parish

⁴⁸ *Id.*

⁴⁹ 257 N.E.2d 239, 241–42 (Ill. App. Ct. 1970).

⁵⁰ *Id.* at 239–40.

⁵¹ *Id.* at 240.

⁵² *Id.* at 242–43.

assets for diocesan purposes.⁵³ But because it is not yet certain whether American civil law will do the same,⁵⁴ parishioners are rightly concerned about the ultimate destination of their donations.⁵⁵ So how did we get to this point, and what do we do about it?

There have been roughly three phases in our culture's handling of allegations of sexual misconduct with minors over the past half-century or so. These three phases are not mutually exclusive, but in each of the cited periods there is a predominant emphasis on one approach over another. Prior to 1960, sexual misconduct with minors was viewed primarily as a moral failure to be dealt with spiritually, according to which penance, absolution, and a firm purpose of amendment not to sin again were the prescribed remedies.⁵⁶ From 1960 to roughly 1990, the approach was primarily therapeutic, for which treatment was the apparent solution, after which offenders were often deemed rehabilitated and recommended for return to ministry.⁵⁷

⁵³ See CIC-1983, c. 515, § 3 (providing that parishes automatically become public juridic persons when they are established); *id.* c. 1256 (stating that ownership of goods belongs to the juridic person that has acquired them legitimately); *id.* c. 1263 (allowing the diocesan bishop, after hearing the diocesan finance council and presbyteral council, to impose a moderate tax for the needs of the diocese upon public juridic persons subject to his governance; this tax is to be proportionate to their income).

⁵⁴ See Fred J. Nafziger, *Bankruptcy Defeats: What the Portland and Spokane Cases Mean for the Catholic Church*, AMERICA, Mar. 27, 2006, at 11, 11, available at http://www.americamagazine.org/content/article.cfm?article_id=4694 (noting that parishes claimed their assets belonged to each individual parish, while the creditors in bankruptcy claimed that all the assets of parishes collectively were the assets of the diocese in which they were located); see also *On File*, 35 ORIGINS 672, 672 (2006) ("A U.S. bankruptcy judge in Portland, Ore., has indicated she will not permit sex abuse plaintiffs to be paid from parish property before the issue of parish ownership has been resolved through appeals in the courts."); *On File*, 36 ORIGINS 112, 112 (2006) ("Parishes in the Diocese of Spokane, Wash., are not owned by the diocese . . ."). Both bankruptcies were settled without resolving the legal question of whether parish property is considered part of the diocesan assets. See Ed Langlois & Robert Pfohman, *1st Catholic U.S. Bankruptcy Ends with \$75 Million Settlement*, CATHOLIC NEWS SERVICE, Apr. 19, 2007, available at http://www.catholic.org/national/national_story.php?id=23829.

⁵⁵ Suzanne Sataline, *The Backlash Against Tithing*, WALL ST. J., Nov. 23, 2007, at W1.

⁵⁶ See, e.g., Michael Brennan, *Child Sexual Abuse "Moral Failure Rather than Crime,"* IRISH EXAMINER, June 17, 2005, available at <http://archives.tcm.ie/irish/examiner/2005/06/17/story41282459.asp>.

⁵⁷ See Mary Gail Frawley-O'Dea, *Preface* to PREDATORY PRIESTS, SILENCED VICTIMS: THE SEXUAL ABUSE CRISIS AND THE CATHOLIC CHURCH xi, xii-xiii (Mary Gail Frawley-O'Dea & Virginia Goldner eds., 2007).

However, since 1990, the approach has been primarily legal, in terms both of canon law and of civil law, with the imposition of penalties on clerical perpetrators and the seeking of monetary settlements and damages for alleged wrongs.⁵⁸ As a result of our highly litigious culture and relatively unchecked exposure to liability, an undue burden has been placed on our free exercise of religion guaranteed by the First Amendment of the United States Constitution. This burden needs to be lifted.

While a full return to the complete charitable immunity of the past is neither likely nor desirable, the civil law of our land needs to reflect a reasonable balance between providing equitable remuneration for those who have been harmed by agents of charitable and religious institutions and respecting the charitable intent of donors whose contributions have been given in trust to be used for charitable and religious purposes. The unlikelihood of returning to full charitable immunity is a political reality, but full charitable immunity is also undesirable because *reasonable* liability serves legitimate public purposes of compensation and accountability. My point is that the pendulum has swung from the complete protection of charitable immunity to the complete exposure of charitable liability and, in some cases, all the way to charitable bankruptcy. My hope would be to restore some sense of balance, which I would call *preserving charitable viability*.

Charitable immunity came into existence because society felt a need to protect the donative intent of charitable contributions and to protect the institutions that such donations supported. Society determined that these institutions provided services or promoted values that fostered the common good. The doctrine eroded because of the desire to provide just compensation for those who have been harmed by the tortious conduct of charitable institutions and their agents, as well as to serve as a measure of public accountability for their wrongful or negligent actions. Now we must ask whether we are seriously eroding the charitable patrimony of American society that has done so much to feed the hungry, to educate and care for children, and to otherwise provide for the basic human needs of the poor. We must also ask as a matter of public policy if society is prepared to

⁵⁸ Cf. John J. Coughlin, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, 44 B.C. L. REV. 977, 986–92 (2003) (noting “a general societal shift in the 1980s from the psychological to the punitive in sexual abuse cases”).

shoulder the cost of the increased demand for government to provide such services if charitable institutions can no longer afford to do so.

Whether intended or not, the current legal reality of complete liability exposure is undermining the charitable works and the religious freedom of the Church and other religious and charitable organizations. This is an important issue. We should not be passive, but take considered, compassionate, and constructive steps to address it. Some of these devices to help preserve charitable viability are under our own control, such as forming parishes as separate not-for-profit corporations or express trusts in order for their structures to more closely reflect their status in canon law as separate juridic persons that are distinct from the diocese.⁵⁹ Others may be pursued as legislation or may be decided by the courts themselves as a natural evolution of the doctrine of charitable immunity.

Recognizing that it is not realistic or desirable to return to the former notion of charitable immunity, we might want to look to reforms that have already been enacted or are under discussion in various states that have put some limits on medical malpractice liability. Just as those reforms seek to preserve the provision of medical services, this revised approach might appropriately be termed *preserving charitable viability*, which seeks to strike a balance between preserving the ongoing existence of the charitable activities for which funds were donated, while providing reasonable compensation for those who have been harmed by the charitable institution.

Some possible approaches to preserving charitable viability that merit serious discussion:

- Lobbying the state legislatures to enact legislation that limits tort recovery against a charitable organization to the extent of the organization's annual aggregate liability insurance, but that also requires that the organization maintain a minimum level of insurance coverage.
- Mandating appropriate state regulation of insurance coverage.
- Capping compensatory damages at predetermined levels, given that insurance may not be available.

⁵⁹ See *supra* note 53 and accompanying text.

- Eliminating punitive damages in cases involving charitable institutions.
- Placing caps on attorneys' fees when suing a charitable institution.
- Providing statutes of limitations that are consistent in their application and meaningful, rather than subject to questionable notions such as "recovered memory" and ambiguous terms such as when the harm is "discovered."
- Requiring that the charitable institution have actual knowledge of a perpetrator's previous wrongdoing in order to be liable for any subsequent harms.
- Requiring that indemnification be provided in conjunction with government grants and contracts for the provision of social services.
- Mandating conciliation or arbitration of claims.
- Providing that any damages that are awarded are actually used to help victims and prevent future harm, rather than intending punishment as the primary objective of awards.

In considering these proposals, one might ask what would distinguish "charitable institutions" that engage in various activities such as health care from "non-charitable institutions" that engage in the same activities. That is, under a regime of "charitable viability" shouldn't the patient at a Catholic hospital who has the wrong kidney removed by a negligent doctor be able to recover as much as the patient at a for-profit hospital who suffers from the same negligence? Should the happenstance of which hospital he goes to dictate the amount he can recover? What if the negligence on the part of each institution was the same? My answer to that question is that I would treat medical malpractice claims in a separate category, with the same limits on liability whether the hospital is for-profit or nonprofit.

A *moderate* legislative approach seems the most effective means for implementing the above suggestions, given that courts will not likely reinstate charitable immunity where it has been abolished. This approach seeks to balance the interest of both tort victims and religious and charitable organizations. Moreover, an approach that limits the liability of religious and charitable organizations, but simultaneously ensures that funds will be available to compensate tort victims, serves to maximize

the interests of both sides.⁶⁰ Alternatively, without waiting for legislatures to act, courts themselves might take the approach of balancing the competing interests as a natural development of previous decisions concerning charitable immunity. After all, courts had cited the belief that the likelihood of bankruptcy was remote even if charitable immunity were abolished, as in the case of *Molitor v. Kaneland Community Unit District No. 302*,⁶¹ where the Illinois Supreme Court noted that no school districts had ever gone completely bankrupt due to tort liability and that "[t]ort liability is in fact a very small item in the budget of any well organized enterprise."⁶² That may have been true in 1959, but as pointed out earlier, several dioceses and other charitable institutions have filed for bankruptcy or have had to discontinue their charitable services as a result of lawsuits. Tort liability is no longer a very small item in the budget, even in the best organized enterprises. Again, these are not fully developed proposals, but some suggestions designed to prompt further discussion and dialogue.

In sum, the litigious culture in which the Church is situated in the United States has had a deleterious impact on the exercise of religious liberty. The burdens of this adverse impact need to be lifted and can be lifted by more strategic use of legal mechanisms such as separate not-for-profit corporations or express trusts. Others may be pursued as legislation or may be decided by the courts themselves as a natural evolution of the doctrine of charitable immunity. This revised approach might appropriately be termed *preserving charitable viability*, which seeks to strike a balance between preserving the existence of the charitable activities for which funds were donated, while enabling charitable organizations to provide reasonable compensation for those who have been harmed by the agents of charitable institutions. Such approaches could help to lift the burdens on religious exercise in a litigious culture and bring the pendulum to rest.

⁶⁰ See Murray, *supra* note 30, at 13.

⁶¹ 163 N.E.2d 89 (Ill. 1959), *superseded by statute*, 745 ILL. COMP. STAT. ANN. 10/1-101 (West 2008).

⁶² *Id.* at 94-95.